82-1519

NO. _____

Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FLOYD MICKEY ANDREWS,
PETITIONER

V.

BOYD LAWSON AND LOURENA LAWSON,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was reversible error for the trial judge to deny the motions for recusal?

2. Whether it was reversible error for the trial judge to set aside the jury's verdict for the Petitioner by granting a JNOV?

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REFERENCE TO REPORTS OF OPINIONS

None of the opinions in this case have been published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Petitioner seeks review pursuant to 28 U.S.C. 1254(1). The judgment sought to be reviewed was dated and entered November 9, 1982. A40. An order denying a rehearing was dated December 13, 1982. A43.

STATUTES WHICH THIS CASE INVOLVES

28 U.S.C. 144. Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in

any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(June 25, 1948, c. 646, 1, 62 Stat. 898; May 24, 1949, c. 139, 65, 63 Stat. 99.)

28 U.S.C. 455. Disqualification of justice, judge, or magistrate.

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously

practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either

of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the

meaning indicated:

(1) "proceeding" includes pretrial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of the party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding

a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(June 25, 1948, c. 646, 1, 62 Stat. 908; Dec. 5, 1974, P. L. 93-512, 1, 88 Stat. 1609).

Prior to the 1974 revision, 455 read:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

P. L. No. 80-773, 1, 62 Stat. 869, 908

(1948) (amended 1974).

STATEMENT OF THE CASE

In 1976 the Respondents began a suit in Virginia State court against the Petitioner. Proceeding pro se, the Petitioner removed the cause to federal court for diversity. Judge Glen Williams, of the Western District of Virginia, dismissed the action with prejudice. Months later, Judge Williams amended the order to provide that the dismissal be without prejudice. A multitude of proceedings ensued, but of material import is that the Petitioner filed one of the instant civil actions (District Court No. 77-0135-A; Court of Appeals 81-1275) alleging, inter alia, that the Respondents committed malicious prosecution by instituting the original Virginia State court suit. On June 13, 1980 the Petitioner moved for the recusal of Judge

Williams and filed a 16-page supporting affidavit.[1] Before trial, Judge Williams denied the motion without a hearing. Appendix (hereinafter "A"), A1. At trial, in July 1980, the Petitioner won a jury verdict of $10,000.00 for malicious prose-

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[1] CONTENT OF THE AFFIDAVIT: The affidavit, sworn to by the Petitioner, stated, inter alia, five points: (1) Judge Williams "stated that he had," during the course of the instant litigation, "given legal advice" to the feme Respondent and that Judge Williams said he would continue to do so if asked, since the Respondents were not at that time represented by counsel. (2) The feme Respondent indicated to the affiant that Judge Williams advised her not to speak with the Petitioner unless he (Judge Williams) was present. (3) Judge Williams told the affiant that if he did not settle with the Respondents he would dismiss the Petitioner's claims against them but would allow the Respondents to continue with their counterclaims. (4) When the Respondents were represented by attorneys in the instant litigation, and in the previous federal case, their attorneys apporached Judge Williams ex parte and discussed facts of the case. They asked Judge Williams for advice on how to proceed. Judge Williams told them what motions to file and what evidence to present. (5) The affiant "will want to call Judge Williams as a witness to explain his reactions to the [Respondents] and their counsel" in various conferences relating to the original suit that the Petitioner was claiming had been maliciously prosecuted as his ground in the instant litigation.

cution. The Respondents moved for judgment notwithstanding the verdict or in the alternative for a new trial, and six months later Judge Williams granted the JNOV, entering judgment for the Respondents on the malicious prosecution claim. A3.

After the jury's verdict, the Petitioner filed a new complaint in the same court against the Respondents (Civil action 80-0281-A; Court of Appeals 81-1276). In that action, the Petitioner moved for the recusal of Judge Williams with a motion similar to the previous one. On January 28, 1981, Judge Williams denied the recusal motion in the new case, A2, and granted the JNOV, setting aside the jury's verdict and giving judgment for the Respondents. A3. A few days later, he dismissed the new action. A26.

In granting the JNOV, A8, the trial judge

relied on Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E. 2d 108 (1980) and his finding that there was no proof of either special injury, arrest of person, or seizure of property. However, the evidence showed seizure of property; the original attachment and levy and the lis pendens were in evidence. The lis pendens, affecting title to over one hundred acres of real property, had remained in effect for over two years. An attorney/witness testified that he would not have certified a title with a lis pendens like that placed by the Lawsons on Andrews' property, even after dismissal of the lawsuit.

The Petitioner appealed both the JNOV and the dismissal, and the Court of Appeals affirmed. A40. It denied a petition for rehearing. A43. Certiorari is sought in both actions.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the trial court for both cases was pursuant to 28 U.S.C. 1332(a), diversity.

ARGUMENT

SUFFICIENT GROUNDS WERE SHOWN TO REQUIRE RECUSAL OF THE TRIAL JUDGE.

Recusal was called for under 28 U.S.C. 455(a), (b)(1), and (b)(5).

Before the trial, Judge Williams read the 16-page affidavit, including the five grounds stated in this Petition, supra at page 14. The first four grounds would cause one to "reasonably question" his impartiality, and that is enough under 455(a) to require recusal. The facts in the affidavit must be accepted as true, even if the judge believes they are false. United States v. Azhocar, 581 F. 2d 735, 739 (9th Cir. 1978); Mims v. Shapp, 541 F. 2d 415, 417 (3d Cir. 1976); Church of Scientology

v. Cooper, 495 F. Supp. 455, 462 (D.C. Cal. 1980).

Both 455(a) and (b)(1) were met by the statements of Judge Williams before the jury, virtually calling the Petitioner a liar while he testified, and by the judge's characterization of the Petitioner's affidavit as a "blatant, false attack." A "reasonable basis for doubting" his impartiality is enough under 455(a). Roberts v. Bailar, 625 F. 2d 125, 129 (6th Cir. 1980). These actions fit into the rule of United States v. Holland, 655 F. 2d 44 (5th Cir. 1981), where, out of the jury's hearing, the judge said that he felt the defendant had "broken faith" with him in a previous trial and had taken improper advantage on appeal of that breaking faith. The Court of Appeals reversed under 28 U.S.C. 455(a), saying, "[We] conclude that a reasonable man would be convinced that

the trial judge's impartiality might be questioned." Id. at 47. A like rule was applied to mandate recusal in Roberts, where the judge had, pre-trial, praised a person involved in the case. In a case where a State judge showed "marked personal feelings" and where incidents of "unseemly conduct" had left "personal stings," this Court held that due process required that another judge sit. Taylor v. Hayes, 418 U.S. 488, 503 (1974).

"Personal bias" under 455(b)(1) was shown by the facts that satisfy 455(a).

The affidavit stated that the Petitioner "will want to call Judge Williams as a witness." Supra at page 14. That appears to meet 455(b)(5)(iv).

It seems logical to assume that Judge Williams' vehement denial (supra at page 18) of the affidavit's statements affected his ability to consider them true under

Azhocar. His recusal orders indicate nothing of his reasoning.

The course of trial ran rough. When the Petitioner was on the witness stand, he referred to statements that Judge Williams had made in the original, allegedly maliciously prosecuted suit. The Respondents objected on the ground that Judge Williams, as the trial judge, could not be called to testify. The Petitioner explained that he had told the court previously that such testimony would be needed. Judge Williams, in the jury's hearing, said "you have not." The Petitioner answered, "In my recusal motion." Judge Williams answered, "You have not. You have not." "You have not said that I would have to testify in this case. There's no such motion as that." After considerable other testimony was given, including more by the Petitioner himself, Judge Williams told the jury that

he had not meant to reflect on or challenge the truthfulness of the Petitioner and that the reason that he had contradicted the Petitioner was that the statement was in the affidavit in support of the recusal motion, rather than in the motion itself.

During the trial and out of the jury's hearing, Judge Williams commented on the Petitioner's affidavit, saying that it "is one of the most blatant, false attacks that I have ever read . . . [You] have stated things in here that are totally false, totally false, and you knew they were false when you made them."

THE DECISIONS OF THE CIRCUITS CONFLICT ON WHETHER THE SOURCE OF THE BIAS MUST BE EXTRAJUDICIAL UNDER 28 U.S.C. 455.

In this case, because there was no extra-judicial source to the judge's bias, the Court of Appeals affirmed. A40.

The extrajudicial source rule arose under the recusal statutes before the major 1974 amendments. Before those amendments, the Supreme Court had established that bias arising from participation in the proceedings availed nothing toward obtaining recusal. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). However, in 1974, 28 U.S.C. 455 was rewritten.

> Prior to 1974, section 455 did not reach questions of bias or prejudice, but merely provided for disqualification because of specified relationships to a case or because of a substantial interest in the case. . . . Prior to the 1974 amendment, questions of judicial bias or prejudice were raised under 28 U.S.C. 144.

United States v. Hines, 696 F. 2d 722, 728 (19th Cir. 1982). The proper standard after 1974 is explained in Hines:

> The effective scope of section 455 is much broader. There are no express procedural hurdles and, while subsection (b)(1) requires recusal if the judge has actual

> personal bias or prejudice or extrajudicial knowledge of disputed evidentiary facts, subsection (a) requires recusal merely if the circumstances are such that the judge's "impartiality might be reasonably questioned." Id. at 728.

The Fifth Circuit recognizes as an exception to the extrajudicial rule, under both 28 U.S.C. 144 and 455,

> the situation in which such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.

United States v. Phillips, 664 F. 2d 971, 1003 (5th Cir. 1981), cert. denied, 102 S. Ct. 2965 (1982). The Eighth Circuit says that to disqualify a judge under the relevant statutes, the litigant may meet the burden by pointing

> to specific behavior on the part of the judge which reasonably suggests there has, in fact, been some friction between the judge and the complaining party.

Ouachita National Bank v. Tosco Corp., 686

F. 2d 1291, 1300-01 (1982).

The problem is that courts continue to apply Grinnell, which arose before the re-write of 455. That the Court of Appeals below applied the old form of 455 is shown by the opinion's sole cite -- to a case decided in 1974 and which did not speak of the 1974 amendments. A41.

A number of the circuits have stated that an extrajudicial source must be shown under 455(a). The Fourth Circuit has said:

> The bias or prejudice that would require a judge to recuse himself must come from an extrajudicial source and affect the judge's opinion on the merits. United States v. Grinnell Corp., 384 U.S. 563, 583 . . . (1966).

Fitzgerald v. Penthouse Intern, Ltd., 691 F. 2d 666, 672 (1982). Ronwin v. State Bar of Arizona, 686 F. 2d 692, 700-01 (9th Cir. 1981). King v. United States, 576 F. 2d 432, 437 (2d Cir. 1978), cert. denied, 439 U.S. 850.

In a case before Fitzgerald, the Fourth Circuit questioned the validity after 1974 of the extrajudicial rule and of Grinnell, decided in 1966. That Circuit has said that the doctrine that partiality disqualifies only if it comes from an extrajudicial source

> was grounded in substantial part on the "personal bias or prejudice" language of other predecessor statutes, and there may be some question about the extent to which it applies to the objective standard created by the 1974 amendment to 455.

Rice v. McKenzie, 581 F. 2d 1114, 1117-18, (4th Cir. 1978).

THE COURT SHOULD HAVE REVERSED THE JNOV, AND REINSTATED THE JURY'S VERDICT.

The trial judge's stated ground for granting the JNOV was that Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E. 2d 108 (1980), required proof of injury in a malicious prosecution action, and that the Petitioner

had not shown such proof. The Petitioner, however, established seizure of property by showing attachment and levy and recordation of a lis pendens, and Ayyildiz specifically considers such proof sufficient to make a malicious prosecution action.

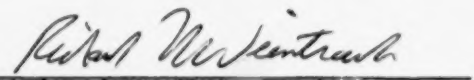
THIS COURT IS CALLED ON TO EXERCISE ITS POWER OF SUPERVISION.

The Petitioner understands that this Court cannot grant every certiorari petition, even when error is plain. But when the error eats at the core of the judicial system--the impartial judge--it challenges all the thousands of cases decided in our courts each year. We have a nationally-mandated standard in the recusal statutes, but the Fourth Circuit and many others are applying the standard Congress evidently meant to erase. Since 1974 this Court has

addressed several cases under 28 U.S.C. 455 but none dealing with the 1974 amendments. To the public, it is probably bad enough that the judges judge themselves in these cases. But it is much worse if the judges appear to set the bounds of their conduct more loosely than Congress has fixed them.

CONCLUSION

The Petitioner requests the grant of a Writ of Certiorari.



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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

FLOYD MICKEY ANDREWS,	)	
	)	NO. 77-0135-A
v.	)	
	)	O R D E R
BOYD LAWSON, et al	)	

The defendants having filed a motion for continuance in the above styled case and the court having considered same, it is hereby adjudged and ordered that the motion for continuance is overruled.

The plaintiff having filed a motion for recusal and for change of venue, and the court having considered same, it is hereby adjudged and ordered that the motion for recusal and change of venue is denied.

This case will proceed for trial at Abingdon at 9:30 a.m., on the 7th day of July, 1980, before a seven member jury.

Certified copies shall be mailed to Floyd Mickey Andrews, Boyd and Lourena Lawson and Howard McElroy.

ENTER: This 24th day of June, 1980.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

FLOYD MICKEY ANDREWS,)
) NO. 80-0281-A
v.)
) O R D E R
BOYD LAWSON, et al)

The plaintiff's motion for recusal is hereby denied.

The Clerk of this court is directed to send certified copies of this Order to plaintiff and to counsel for defendants.

Enter: This 28th day of January, 1981.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

FLOYD MICKEY ANDREWS, Plantiff	)	CIVIL ACTION
v.	)	NO. 77-0135-A
BOYD LAWSON and LOURENA LAWSON, Defandants	)	O R D E R

In accordance with the Memorandum Opinion entered this date, it is hereby ORDERED that:

(1) the judgment rendered by the court entered 9 July 1980 in accordance with the verdict of the jury finding for the plantiff in the amount of ten thousand dollars ($10,000.00) is hereby set aside and judgment is hereby granted to the defendants on the complaint filed by the plantiff;

(2) the motion of the defen-

dants to set aside the verdict on their counterclaim and render judgment to them notwithstanding the verdict, or to grant a new trial on the counterclaim, is denied; and

(3) the injunction entered by this court on 27 October 1980, enjoining the defendants from conveying their real property without first making application to the court for approval of a suitable escrow or trust fund is hereby lifted.

The Clerk of this court is directed to send certified copies of this Order to counsel of record.

ENTER: This 28 day of January, 1981.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

FLOYD MICKEY ANDREWS,
Plaintiff
v.
BOYD LAWSON and
LOURENA LAWSON,
Defandants

CIVIL ACTION
NO. 77-0135-A
MEMORANDUM OPINION

The plaintiff, Floyd Mickey Andrews, a resident of North Carolina, brought this action for malicious prosecution against the defendants, Boyd Lawson and Lourena Lawson, residents of Virginia. The defendants counterclaimed, alleging breach of contract and fraud. Jurisdiction of this court is vested in 28 U.S.C. 1332(a), diversity. This case is presently before the court on the defendants' motion for judgment notwithstanding the verdict, or for a new trial. For the reasons stated, the motion for judgment notwithstanding the verdict is granted as to the award of damages to the plaintiff, and

overruled as to the jury's verdict to the plaintiff on the defendants' counterclaim.

I.

On 18 May 1976, the defendants entered into a contract with the plaintiff whereby they were to be paid $2,000 for a three-day lease of their property for use as the site of a music festival titled "Stompin 76". The rock concert took place as scheduled, with an estimated 100,000 people in attendance. The defendants subsequently brought suit in state court against the plaintiff for breach of contract and fraud, alleging that the plaintiff had failed to properly clean debris from and repair damage to the property resulting from the concert, and that the plaintiff had misled the defendants as to the size and nature of the concert. The plaintiff removed the action to federal

court; it was later dismissed without prejudice.[1]

The plaintiff filed this suit for malicious prosecution against the defendants; the defendants counterclaimed, alleging breach of contract and fraud. The case was tried by a jury, resulting on 9 July 1980 in a verdict in favor of the plaintiff and fixing his damages at ten thousand dollars. Execution of the judgment was later stayed, and, at a subsequent hearing, the defendants were enjoined from disposing of any of their real estate pending final determination of this case.

The case is now before the court

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[1]The dismissal without prejudice of the first action was effected only after three appeals had been taken by the plaintiff to the United States Court of Appeals for the Fourth Circuit. For the history of that litigation, see Boyd Lawson, et al v. Floyd Mickey Andrews, Civil Action No. 76-0818-A (W.D. Va. 13 May 1980) (unpublished), aff'd No. 80-1399 (4th Cir. 10 Nov. 1980) (unpublished).

on the motion of the defendants for judgment notwithstanding the verdict and/or for a new trial. Briefs have been filed on behalf of the plaintiff and the defendants, and the court has reviewed a great deal of the evidence in this case by listening to the tapes of testimony given at trial, there being no transcript of the testimony available.

II.

While the defendants have raised numerous grounds in support of their motion for judgment notwithstanding the verdict, the court considers it necessary to address only one of these grounds, which is set forth in the supplemental memorandum of the defendants. On 18 April 1980, the Supreme Court of Virginia entered an opinion in the case of Ayyildiz v. Kidd, _____ Va. _____, 266 S.E. 2d 108

(1980).[2] In Ayyildiz v. Kidd, the Virginia Supreme Court adopted what is known as the English rule of damages in malicious prosecution cases stemming from civil proceedings: to recover, the plaintiff must allege and prove arrest of person, seizure of property, or special injury incurred. Id., 266 S.E. 2d at 111. The Court adopted the English rule in part because "[i]n a malicious prosecution action arising from a civil matter, there should be no restraint upon the suitor through fear of liability resulting from failure of his action. Also, disputes should not be tried a second time under the guise of actions for malicious prosecution." Id. The Court went on to

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[2] Although the Ayyildiz opinion was entered prior to trial of the case at bar, this court was not aware of the decision because it had not yet been published. Apparently, the parties in this suit were also unaware of the case at the time of trial.

define special injury as "requiring proof of a special loss or unusual hardship resulting from the malicious prosecution of the original action . . . [which] excludes the kind of secondary consequences that are a common and often unavoidable burden on defendants in all similar cases." Id. (citation ommitted).

In the complaint filed in this cause, the plaintiff has alleged various items of damages: (1) four thousand dollars for his time as his own attorney in defense against the defendants' actions (Par. 16); (2) damage in excess of twenty thousand dollars to his business, credit, and professional relationships as a result of the notoriety created (Par. 17); (3) fifteen thousand dollars as a result of the cloud on the title to his land which prevented him from selling, leasing, or

using as collateral any of his property (Par. 18); (4) fifteen thousand dollars for the emotional and mental distress and physical impairment he has suffered as a result of the wrongful actions of the defendants (Par. 19); (5) one thousand dollars damage for the wrongful attachment of his personal property (Par. 20); and (6) twenty-five thousand dollars in punitive damages.

After reviewing the evidence submitted by the plaintiff at trial, the court finds that the only proof of damages offered by the plaintiff was given near the end of his own testimony when he stated to the jury:

> [D]uring my defense from the Lawsons' actions in this case, I spent at least two thousand hours of my time, including the time that I'm going to be here today. I normally charge my time at twenty-five dollars an hour for my time. I know

> it sounds outrageous and disproportionate to the issues that are involved here.

Damages are not presumed but must be proved. Hailes v. Gonzales, 207 Va. 612, 151 S.E.2d 388 (1966). Because the worth of his time as an attorney on his own behalf was the only damage of any kind which the plaintiff proved, that is the only evidence upon which a jury could have rendered a verdict without speculating as to damages incurred. The jury awarded the plaintiff ten thousand dollars; in fact he sought only four thousand dollars damages in his complaint for time spent on his case.[3] Assuming that the

[3] The court is quite familiar with this case and must comment that it is almost beyond comprehension that the plaintiff would have spent two thousand hours on this case. However, if he had done so, his time must include the three appeals taken to the United States Court of Appeals for the Fourth Circuit in the original civil action from which this suit stems. (See footnote 1). Two of these appeals were resolved against the plaintiff on the issues he had raised; certainly the defendants should not be charged with this time.

plaintiff is correct in his estimate and assuming that the defendants are responsible for this time, the issue is whether damages awarded for the plaintiff's time spent as attorney on his own behalf qualifies as special injury under the English rule adoped in Ayyildiz v. Kidd, supra.

In Ayyildiz, the Virginia Supreme Court stated clearly that plaintiffs in malicious prosecution cases stemming from civil actions could not recover common expenses that are an "unavoidable burden on defendants in all similar causes." Ayyildiz v. Kidd, _____ Va. _____, 266 S.E.2d 106, 111 (1980). Time spent on a case is not special injury, and the attorney's fee spent in a case is not special injury. As the Virginia Supreme Court noted in Ayyildiz, the expense to the plaintiff of bringing an action deters frivolous suits in civil proceedings. Id.

Therefore, the court finding that the plaintiff has not proven any damages except the amount of time he spent on this case, which, because he is a lawyer, he treats as attorney's fees, the court holds that such damage is not special injury recoverable in malicious prosecution cases. Accordingly, the judgment rendered by the court in accordance with the verdict of the jury is set aside, and judgment is granted to the defendants on the complaint filed by the plaintiff. The injunction which was entered prohibiting the defendants from selling or disposing of their property is lifted. An appropriate order shall issue.[4]

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[4] In view of the Ayyildiz holding, which mandates the decision to set aside the judgment rendered in accordance with the jury verdict in the case at bar, the court finds it unnecessary to review the other issues raised by the defendants and briefed by both parties.

III.

The final issue to be considered is whether the judgment granted to the plaintiff on the defendants counterclaim should be set aside and judgment notwithstanding the verdict or, alternatively, a new trial, should be granted to the defendants. The jury was instructed they could find for the defendants on their counterclaim on either one of two theories -- (1) breach of contract or (2) fraud.

On the breach of contract issue, the court directed the jury that they should find for the defendants on their counterclaim unless they believed that the defendants had released the plaintiff from his responsibility to pay for the clean up of the property or had prevented him from carrying out his agreement. The jury having found in favor of the plaintiff on the

counterclaim, the court must view the evidence in light of whether there was evidence which, if believed by the jury, would have been sufficient to have found either that the plaintiff had been released from his responsibility under the lease agreement or had been prevented from complying with the contract.

As to the defendants preventing the plaintiff from cleaning up, Floyd Andrews, father of the plaintiff, F. Mickey Andrews, testified that while neither he nor his son thought they were legally obligated to clean up the defendants' land, he felt that he should assist. He stated that he came on to the defendants' land and removed thirty-six loads of garbage, which comprised at least two-thirds of all the trash on the defendants' land. After reviewing the testimony of Floyd Andrews,

it is not clear to the court that Floyd Andrews testified that he was prevented from continuing to remove the remainder of the garbage from the defendants' land. However, at trial, the court was of the opinion that Floyd Andrews had actually testified that the defendants had told him to quit. There is no question that the defendant Mr. Lawson testified he did tell Floyd Andrews to leave; he gave an an excuse that Floyd Andrews was not conducting the clean-up in accordance with the instructions of the Health Department.

While the point is not specifically raised by the defendants in their motion for a new trial, the court is concerned about one phase of the jury instructions in the light of the evidence which the court has found upon listening to the tapes of the actual testimony at the trial.[5] After

[5] As noted earlier, a transcript of the trial was not available.

the court had concluded the charge to the jury, the plaintiff F. Mickey Andrews appeared before the court and complained that the court had not given in the jury instructions specific examples from the testimony which was favorable to him. In particular, he asked the court to instruct the jury regarding the testimony of his father to the effect that he had been prevented from concluding the clean-up. Accordingly, in an endeavor to be totally fair to the plaintiff, and having in mind that the plaintiff had earlier accused the court of bias, the court specifically instructed the jury as follows:

> On the other hand, when his father came up to do the work, according to their testimony, that they were prevented from doing it and told to leave, which, of course, there is a conflict in the evidence and that is for you to resolve.
>
> However, as previously stated,

upon reviewing the evidence of Floyd Andrews, the court does not find any testimony from Floyd Andrews which specifically states that the defendants prevented him from cleaning up their land or prevented his son F. Mickey Andrews from doing so. The nearest testimony the court could find is as follows:

> Q. Well, I take it some time you stopped the clean-up there.
>
> A. Yes.
>
> Q. Why did you stop the clean up?
>
> A. Well, Mr. Lawson told me one time there wasn't nothing I could do.
>
> Q. Did he ever give you any reason for the statement?
>
> A. No.
>
> Q. Did he ask you to keep cleaning up?
>
> A. He just said there wasn't nothing I could do.

Q. Did you still offer to continue cleaning up?

A. Yeah, I sure did.

Thus, while the testimony of Floyd Andrews is not exactly in accord with what the court instructed the jury, and the instruction may have been somewhat misleading, the court is of the opinion that, in view of the testimony of Mr. Lawson, that indeed he had told Mr. Andrews to stop work, giving as his reason that Floyd Andrews' efforts were not in accord with the Health Department's instructions, the overall effect of the instruction was such as not to mislead the jury. There was evidence from which the jury could have found that the defendants did in fact stop the clean-up to such a degree as would have excused the plaintiff from his contract.

Further, assuming the evidence is not clear as to whether the defendants

stopped the plaintiff's efforts to remove trash from the property, the court is of the opinion that if error was committed in the jury instructions, it was harmless error, as there was ample testimony from which the jury could have determined that the defendants had in fact released the plaintiff from his obligations under the contract and were well aware that the plaintiff had assigned the lease to Cactus Productions, making Cactus Productions responsible for clean-up and repairs. Circumstantial evidence may be admitted as proof to show that the lessor had accepted the assignment of the lease and to have accepted the obligation of the lessee of the second lease in lieu of the original lease.

> [T]he law does not require direct proof of an agreement in any form to establish the fact of the lessor's acceptance

> of the assignee of the lease as an obliger in lieu of the original lessee; it may be established by acts of the parties or circumstances inconsistent with any other conclusion.

49 Am.Jur.2d, Landlord and Tenant 437, at 442. The plaintiff testified that prior to signing the lease with the defendants, he informed them that he intended to assign the lease to Cactus Productions and that Cactus would be responsible for clean-up and repair. This testimony was corroborated by Janice Messick and to a certain degree, by witnesses Semones and Teller. There was conflict in the evidence in this case between the defendants, who contended they were totally ignorant of the nature of the festival which was going to be held, and the plaintiff and his witnesses, regarding the defendants' knowledge of the nature of the festival. Much of the testimony could have led the

jury to believe that there would probably be a huge crowd present, and that this huge crowd could be relied upon to deposit the vast amount of trash that was left on the property. Certainly the jury could have concluded that the plaintiff as well as the defendants were naive about or even ignorant of the consequences of the Stomp-In 76 Festival. The jury apparently came to the conclusion that the problems were as much the responsibility of one as the other. There was ample evidence from which the jury could have concluded that the defendants did release the plaintiff from his responsibility for the clean-up, and were aware that they should look to Cactus Productions Company to clean up. This construction of the events is certainly plausible; the testimony showed that the defendants first approached Cactus to clean up the premises, and that, when the

Health Department was brought into the situation, it was agreed that it was Cactus' responsibility to clean up.

The court is of the opinion that the issue of liability of the plaintiff on the defendants' counterclaim of breach of contract was one for the jury, and was resolved in favor of the plaintiff. Further, on the issue of fraud, the court finds there was a conflict in the evidence as to whether fraud was committed on the defendants, and that the jury resolved that conflict in favor of the plaintiff. Therefore, the motion of the defendants of set aside the verdict and render judgment to them notwithstanding the verdict, or to grant a new trial on the counterclaim, is denied.

An order shall issue granting judgment to the defendants on the plaintiff's original complaint and granting

judgment to the plaintiff on the defendants' counterclaim.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 28 day of January, 1981.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

FLOYD MICKEY ANDREWS, Plaintiff	)	
v.	)	
BOYD LAWSON and LOURENA LAWSON, Defendants	)	CIVIL ACTION
and	)	NO. 80-0281-A
BOYD LAWSON and LOURENA LAWSON, Third Party Plaintiffs	)	MEMORANDUM OPINION
v.	)	
WHITE, ELLIOTT & BUNDY, Third Party Defendants	)	

The plaintiff, Floyd Mickey Andrews, a resident of North Carolina, brings this action for slander, slander of

title, denial of civil rights, fraud, abuse of process, and malicious prosecution against the defendants Boyd Lawson and Lourena Lawson, residents of Carroll County, Virginia. Jurisdiction of this court is vested in 28 U.S.C. 1332(a), diversity. This case is presently before the court on the defendants' affirmative defense of res judicata pursuant to Rule 8(c) of the Federal Rules of Civil Procedure. For the reasons stated below, this case is dismissed as res judicata.

I.

This action has its origins in a contract entered into on 18 May 1976 between the parties, whereby the plaintiff was to pay $2,000 for a three-day lease of the defendants' property for use as the site of a music festival advertised as "Stompin' 76". The defendants brought

suit in state court against the plaintiff in 1976 for breach of contract and fraud; the plaintiff removed that action to this court, where it was subsequently dismissed without prejudice.[1] The plaintiff then filed an action in this court for malicious prosecution against the defendants; the defendants counterclaimed alleging breach of contract and fraud. That case was tried by a jury, resulting on 9 July 1980 in a verdict in favor of the plaintiff in the amount of ten thousand dollars. The judgment was set aside and judgment was granted to the defendants in that action. Floyd

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[1] The dismissal without prejudice of the first action was effected only after three appeals had been taken by the plaintiff to the United States Court of Appeals for the Fourth Circuit. For the history of that litigation, see Boyd Lawson, et al v. Floyd Mickey Andrews, Civil Action No. 76-0818-A (W.D. Va. 13 May 1980) (unpublished), aff'd No. 80-1399 (4th Cir. 13 Nov. 1980) (unpublished).

Mickey Andrews v. Boyd Lawson et ux, Civil Action No. 77-0135-A (W.D. Va. 28 January, 1981) (unpublished).

The plaintiff now alleges slander, slander of title, denial of civil rights, fraud, abuse of process, and malicious prosecution.[2] The defendants have answered with the affirmative defense of res judicata, pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, alleging that the plaintiff presents the same allegations in this suit that were contained in the two previous suits. They have also joined the law firm of White, Elliott and Bundy, who represented them in the previous actions, as third party defendants pursuant to Rule 14 of the Federal Rules of Civil

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[2] As in his previous suit, the plaintiff filed a motion for recusal in this action. That motion was denied by Order of this court dated 28 January 1981.

Procedure.

II.

Res judicata is a judicially created doctrine which gives finality to a prior judgment and precludes relitigation of the same cause of action and relevant factual matters between the same parties. Thomas v. Consolidated Coal Company, 380 F.2d 69 (4th Cir.), cert. denied, 389 U.S. 1004, reh. denied, 389 U.S. 1059 (1967); 1B Moore's Fed. Prac. 0.401. The doctrine "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided . . . , he may not renew the litigation in another court." Heiser v. Woodruff, 327 U.S. 726 (1946). Although the term res judicata is used to refer to the effect of a judgment as a merger, as a bar, or as direct or

collateral estoppel, see, e.g., Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917 (1974); Restatement of Judgments 41 et seq., in its narrowest sense the term refers to a final, valid judgment barring further litigation on the same cause of action between the same parties. Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965); 1B Moore's Fed. Prac. 0.401 et seq.[3]

There are three fundamental principles required for the application of the doctrine of res judicata: "(1) There must be identity of persons and parties to the action; (2) There must be an identity of issue, and (3) The operation

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[3] For a discussion of the distinction between the effect of a judgment as res judicata of the cause of action dealt with, and its collateral effect in litigation involving a different cause of action, see 1B Moore's Fed. Prac. 0.441[1].

of estoppels must be mutual." Byrum v. Ames and Webb, Inc., 196 Va. 597, 85 S.E. 2d 364 (1955).[4]

Res judicata is an affirmative defense which must be pleaded. Crowe v. Cherokee Wonderland, Inc., 379 F.2d 51 (4th Cir. 1967). The defendants have properly asserted their res judicata defense in their answer, pursuant to Rule 8(c) of the Federal Rules of Civil Procedure.

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[4] Under the mutuality requirement, a litigant is prevented from asserting a previous judgment as res judicata unless he would have been bound had the litigation reached the opposite result. 1B Moore's Fed. Prac. 0.412[1]. The recent trend has been to abrogate the mutuality rule, in whole or in part. See, e.g. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965) (construing Virginia law). But see Norfolk and Western Railway Co. v. Bailey Lumber Company, et al., ____ Va. ____, 221 VRR 645 (26 Nov. 1980) ("[W]e decline to spurn the necessity for mutuality in this case."). Whether, and under what circumstances, the doctrine of mutuality should be renounced is not at issue in the case at bar.

Although the time for appeal in the previous case has not yet tolled, the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata where the appellate court is limited to consideration of the trial record. Thus, the judgment in the previous case stands as res judicata until reversed, vacated, or modified. E. I. DuPont deNemours & Co. v. Richmond Guano Co., 297 F. 580, 583 (4th Cir. 1924); 1B Moore's Fed. Prac. 0.416[3].

III.

An examination of the record in the previous suit, Civil Action No. 77-0135-A, and the pleadings in the action now before the court indicates that a final, valid judgment was entered in that action on 28 January 1981, and that the same parties are named in the two actions. The only question remaining is whether there is an identity of issues and facts in the

two lawsuits such that the previous suit is res judicata as to the complaint filed in this action.

The claims alleged in the complaint in the case at bar may be compared to the previous action, No. 77-0135-A, as follows:

> (1) The plaintiff alleges that the defendants made false statements to the press which "seriously damaged the business, professional, personal and community reputation of Andrews and caused him much mental anguish, depression and anxiety resulting in loss of income, needless expense and must lost time and sleep . . . [and] resulted in more than $10,000 in actual damages and merits more than $10,000 in punitive damages. "(Complaint III, p. 2). In his complaint in the previous suit, the plaintiff alleged that his "business, credit, and professional relationships have been damaged in am amount in excess of $20,000.00 by the notoriety created in the press as the direct and proximate result of Defendants [sic] actions." (C. A. No. 77-0135-A, Complaint XVII at 5.).

(2) The plaintiff alleges that the defendants "deliberately left two lis pendens on record in Carroll County", compelling the plaintiff "to sell part of the property for more than $10,000 below market value . . . [and producing] anxiety, depression and mental anguish" in the plaintiff, resulting in "more than $10,000 actual damages and more than $10,000 in punitive damages". (Complaint IV at 3). The plaintiff alleged the same claim in the previous complaint, stating that the lis pendens were "a cloud on the title of [the] plaintiff's real property" and that the plaintiff was "unable to sell, lease, or use as collateral any of the real property so affected, thereby damaging [the] plaintiff in the amount of $15,000. "(C. A. No. 77-0135-A, Complaint XIII at 4, XVIII at 5).

(3) The plaintiff alleges that the defendants removed records from state court and then "conspired with their lawyers to insure that the missing state court records were not properly replaced", thereby violating the plaintiff's civil rights, resulting "in more than $10,000 actual damages . . . [and] $10,000 in punitive damages". (Complaint V at 3). The plaintiff asserted the same claim in

the previous suit, using more specific factual allegations. (C. A. No. 77-0135-A, Complaint X at 3).

(4) The plaintiff's allegation of fraud is in substance merely a rebuttal of the evidence presented by the defendants at the trial in the previous suit. Complaint VI at 4). Questions of the veracity of witnesses were presented to the jury and were resolved, apparently, in favor of the plaintiff. See Floyd Mickey Andrews v. Boyd Lawson et al., Civil Action No. 77-0135-A (W.D. Va. 28 Jan. 1980) (unpublished). The claim of fraud on the court in obtaining the dismissal without prejudice of the 1976 actions has been fully adjudicated. See Floyd Mickey Andrews v. Boyd Lawson et al., Civil Action No. 76-0818-A (W.D. Va. 13 May 1980) (unpublished), aff'd No. 80-1399 (4th Cir. 13 Nov. 1980) (unpublished).

(5) The plaintiff's claim of abuse of process (Complaint VII at 4) was previously asserted in the C. A. No. 77-0135-A (Complaint XV at 4).

(6) The plaintiff's claim of malicious prosecution (Complaint VIII at 5) was the gravamen of the previous suit, in which the

> plaintiff alleged that the defendants "wantonly, maliciously and without cause, commenced a civil action and put upon record a Complaint, an attachment petition, and a lis pendens for the purpose of injuring and destroying the credit and business of Plaintiff and have achieved, [sic] that purpose and have not yet ceased their wrongful actions." (C. A. No. 77-0135-A Complaint XV at 5).

The doctrine of res judicata "reflects the refusal of the law to tolerate needless litigation." Angel v. Bullington, 330 U.S. 183 (1947). A review of the record in Civil Action No. 77-0135-A indicates that the plaintiff has had his day in court on every issue he now presents in the complaint in the case at bar. He alleges no new claims or facts which would overcome the res judicata bar asserted by the defendants. He is therefore bound by the judgment in the previous action. See Kinsley v. Markovic, 333 F.2d 684 (4th Cir. 1964).

Accordingly, this action is dismissed as res judicata.[5]

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to the plaintiff and to counsel for defendants.

ENTER: This 4 day of February, 1981.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

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[5] As indicated, this court is of the opinion that res judicata, not collateral estoppel, is appropriate in this action. However, the court wishes to note that the complaint stems from relevant material matters which were litigated in the prior action. Consequently, even if the complaint had not so closely paralleled the cause of action set forth in the previous suit, the plaintiff would have been estopped from moving forward with this suit.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1275

Floyd Mickey Andrews — Appellant,

v.

Boyd Lawson, and
Lourena Lawson; — Appellees.

No. 81-1276

Floyd Mickey Andrews, — Appellant,

v.

Boyd Lawson, and
Lourena Lawson; — Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, District Judge.

Submitted: December 14, 1981

Decided: November 9, 1982

Before SPROUSE, ERVIN and CHAPMAN, Circuit Judges.

(Floyd Mickey Andrews, Appellant Pro Se; Boyd Lawson, Lourena Lawson, Appellees Pro Se.)

PER CURIAM:

Andrews appeals from the district judge's refusal to recuse himself, an order striking a jury award of damages, and an order dismissing a second suit as res judicata.

Andrews' affidavit in support of his motion for recusal fails to establish bias on the part of the district judge arising from an extrajudical source;

therefore, we cannot find that the district judge erred in refusing to recuse himself pursuant to 28 U.S.C. 455(b)(1). See Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 180 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975).

A review of the record and the district court's opinions discloses that the appeals from both its order striking the jury damage award and its order dismissing the subsequent suit as res judicata are without merit. Because these issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgements below on the reasoning of the district court. Andrews v. Lawson, C/A No. 77-0135-A, (W.D. Va. January 28, 1981); Andrews v. Lawson, C/A No. 80-0281-A (W.D. Va. February 28, 1981).

AFFIRMED.

The foregoing order was entered November 9, 1982.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1275

Floyd Mickey Andrews,

Appellant,

versus

Boyd Lawson, et al,

Appellees.

No. 81-1276

Floyd Mickey Andrews,

Appellant,

versus

Boyd Lawson, et al,

Appellees.

O R D E R

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Sprouse, Judge Ervin, and Judge Chapman.

For the Court,

/s/ William Slate II
CLERK

The foregoing order was entered December 13, 1982.